Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

S&M BRANDS, INC., TOBACCO DISCOUNT HOUSE # 1, and MARK HEACOCK,
Petitioners,

v.

JAMES D. "BUDDY" CALDWELL, in his official capacity as Attorney General of the State of Louisiana,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Forty-six States and numerous tobacco companies have signed an irrevocable agreement, called the Master Settlement Agreement ("MSA"), which divides markets, suppresses price competition, and restricts competitive advertising, with the purpose and effect of increasing both tobacco company profits and state revenues. It is undisputed that this agreement would violate the antitrust laws if entered into by the tobacco companies alone.

The questions presented are:

1. Whether a binding agreement among multiple States and private companies is immunized from antitrust scrutiny under the state-action immunity doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

2. Whether a binding agreement among multiple States, with both intrastate and interstate effects, violates the Compact Clause, Article I, § 10, cl. 3 of the United States Constitution, in the absence of congressional approval.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner S&M Brands, Inc., is a cigarette manufacturer that has not joined the MSA. Petitioner Tobacco Discount House # 1 is a retail tobacco store in Louisiana. Petitioner Mark Heacock is a smoker living in Louisiana.

Petitioners were the plaintiffs in the district court and the appellants in the Fifth Circuit.

None of the petitioners is publicly traded or owned in whole or in part by any publicly traded corporation.

Respondent James D. "Buddy" Caldwell is the Attorney General of the State of Louisiana, being sued in his official capacity. Respondent was the defendant in the district court and the appellee in the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the District Court for the Western District of Louisiana granting defendant summary judgment is unpublished and is attached at Appendix B1-B22. The decision of the Fifth Circuit affirming the district court decision is published at 614 F.3d 172 and is attached at Appendix A1-A14.

JURISDICTION

The Fifth Circuit issued its decision on August 10, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal.

The Compact Clause, U.S. CONST., Art. I, § 10, cl. 3, provides, in relevant part:

> No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign power."

STATEMENT OF THE CASE

During the 1990s, Attorneys General in many States, including Louisiana, sued the four largest tobacco companies (the "Majors") to recoup Medicaid expenses allegedly incurred as a result of fraudulent sales techniques. The tobacco companies drafted a settlement that would enrich themselves as well as the States. Rather than base damages on retrospective losses caused by each tobacco company, the parties agreed to divide payment responsibility based on each company's future market share. The anticipated payments totaled more than $200 billion over the succeeding 25 years, with further payments in perpetuity. Because these payments would place the settling companies at a competitive disadvantage with other manufacturers, the Master Settlement Agreement ("MSA") required the 46 settling States to impose countervailing escrow payments on all nonparticipating tobacco manufacturers, and to insulate the settling companies from competition in a variety of ways described below. The MSA also contained various provisions to prevent its member States from defecting from this nationwide scheme.

As a result of this agreement, the participating States have reaped billions of dollars in revenues each year from duties on tobacco sales without enacting taxes, and the large tobacco companies have been able to increase their prices by an even greater amount – all at the expense of consumers and competition. The States could not have attained this result acting individually because of the force of interstate competition. The tobacco companies could not have attained this result acting without the States because

it would have too blatantly violated the antitrust laws. Only through the binding and irrevocable MSA have they been able to achieve such a result. And, to insulate and preserve this regime from future political pressure, the agreement forbids the signatories to oppose the MSA in the future or even to speak or petition against it.

This lawsuit was filed by a small non-settling tobacco company, a consumer, and a tobacco shop. The plaintiffs contend that the MSA violates the antitrust laws and, because it was not approved by Congress, the Compact Clause of Article I, § 10. The court of appeals held that the agreement is immune from antitrust scrutiny under the state-action immunity doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and falls outside the scope of the Compact Clause because it does not directly conflict with any federal law or other constitutional constraint.

Those holdings, we submit, conflict with this Court's decisions and do grave damage to principles of interstate federalism and competition. Because of the unusual conjunction of interests of the States and the large tobacco companies in sharing the rents generated by the MSA's suppression of competition, and because of the irrevocable and unchallengeable character of the agreement, there is little prospect for effective public debate or legislative scrutiny unless this Court intervenes.

1. In 1998, 46 Attorneys General and the Majors settled numerous lawsuits brought by many States against the Majors by collectively entering into the MSA.

The MSA, which was devised and drafted by the tobacco companies, contained something for almost everyone. For the States, the agreement provided that the Majors and certain other cigarette manufacturers who later joined the MSA would pay more than $200 billion over 25 years, plus other payments in perpetuity. MSA § IX.[1]

For the tobacco companies, in addition to securing them a release from past and potential future liability, the MSA set up an interstate cartel enabling them to charge monopoly prices and recover their MSA costs, plus hefty additional profits, from consumers without fear of price competition among themselves or from non-participating cigarette manufacturers.

2. The MSA establishes this cartel through a variety of restrictions on interstate commerce in cigarettes.

First, the agreement discourages price competition for market share by allocating the costs of the MSA among the Majors in proportion to their *current* national market share of cigarette sales, including sales in States that have not joined the MSA. MSA § IX(c)(1). The percentage of MSA payments by each of the four Majors thus annually rises or falls in relation to its national market share, thereby discouraging price competition for gains in market share that would increase MSA expenses and reduce profits. That disincentive also encourages each company to match price increases by competitors, even beyond those necessary to pass on MSA expenses, in order to

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[1] The lengthy MSA is available in PDF form at http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf.

avoid increased market share (and MSA expenses) that would result from lower relative prices.

Second, the agreement discourages price competition and divides the market among subsequent participating manufacturers ("SPMs") that joined within 90 days by exempting them from MSA payments on all sales at or below their "grandfathered" market shares – the higher of their 1998 sales, or 125% of their 1997 sales. MSA § IX(i). SPMs exceeding their grandfathered market shares are penalized by having to make MSA payments on excess sales.

Third, the agreement stabilizes prices and limits price competition from all other manufacturers joining the MSA after 90 days by imposing annual MSA payments on those manufactures based on their entire national market share. *Id.* The per-cigarette payments by such late-joining SPMs are larger than the per-cigarette MSA payments by the Majors, thereby raising the floor on prices such companies can charge and still recover their costs.

Fourth, the agreement restrains competition among all participating manufacturers by forbidding numerous forms of advertising, as well as lobbying and litigation adverse to the MSA. MSA §§ III(b)-(i), III(m)-(p), XVIII(*l*). Many of those restrictions apply nationwide, not merely within the MSA States. *Id.* §§ II(rr), III(b)-(c).

Fifth, the agreement stabilizes prices and limits price competition from non-participating cigarette manufacturers ("NPMs") that refuse to join the MSA by requiring member States to enact so-called "Qualifying" or "Escrow" statutes compelling NPMs to pay into escrow each year an amount equal to or greater

than the MSA payments on comparable sales. MSA § IX(d)(2)(E); MSA Exh. T.

The MSA's Escrow Statute requirement has the express purpose of "effectively and fully neutraliz[ing] the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of" the MSA. MSA § IX(d)(2)(E); LA. R.S. § 13:5061 (6) (Escrow Statute designed to prevent NPMs from having a "resulting cost advantage").

Absent the Escrow Statutes, smaller tobacco companies that had neither engaged in nor been sued for fraud – and hence had no liabilities to settle – would have had substantially lower per-cigarette costs than companies having to make MSA payments. The Majors and other participating manufacturers thus faced a competitive dilemma: If they raised prices to pass MSA costs on to consumers they risked losing market share to NPMs without such expenses; but if they kept their prices competitive their MSA payments would have eaten into their profits.

The Escrow Statutes raise the costs for NPMs and thereby stabilize prices at or above the level necessary to allow MSA participants to pass their MSA costs on to consumers without risk of price competition from NPMs.

Indeed, the MSA's restrictions on price competition have actually allowed the Majors to raise prices by far more than the amount necessary to make MSA

payments.[2] Thus, after joining the MSA, the major cigarette manufacturers have made record profits from their supra-competitive pricing.[3]

3. The MSA also contains various provisions to prevent member States from defecting from their supporting role in the cartel.

First, the MSA restrains the political and legislative processes of its member States by binding "present and future" state officials, and forbidding States to withdraw from or "directly or indirectly" challenge the MSA. MSA §§ XVIII(g), (*l*). The agreement may not be modified without the unanimous consent of the parties affected. *Id.* § XVIII(j). The ordinary political and legal processes that might mitigate state-imposed or supported restraints on trade thus are rendered inoperative. Future state officials cannot withdraw from, and hence cannot be held accountable for, their participation in the MSA.

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[2] *Final Submission of the Settling States: Expert Report of Jonathan Gruber & Robert S. Pindyck* at 2-3 (Jan. 30, 2006) ("*Gruber & Pindyck Final Sub.*") ("Between 1997 and 2003, OPM premium and discount retail prices increased by much more than MSA marginal costs") [Sealed Doc. 96, attach. 5]; *Report of Plaintiffs' Expert Jeremy Bulow* at 3 (Aug. 13, 2008) ("*Bulow Rep.*") ("the major companies have raised the price of cigarettes by considerably more than the cost of the MSA, or by the amount of any cost increases. Experts for the major companies have acknowledged that the MSA created incentives to raise prices by more than costs increased") [Record on Appeal ("R") R1087].

[3] Mark Curriden, *Up In Smoke*, ABA JOURNAL (March 2007) at 30 (Philip Morris profits "were $4.5 billion in 2005—up 36 percent from 1997," while its stock price doubled).

Second, the MSA requires each State to adopt and diligently enforce the Escrow Statute set out in the MSA in a manner that "effectively and fully neutralizes" the competitive consequences for companies joining the MSA. MSA § IX(d)(2)(E). Failure to do so subjects non-compliant States to the severe financial penalty of having their payments reduced by the so-called "NPM Adjustment," which reduces the MSA fees paid by companies that lose market share as a result of the MSA. MSA §§ II(ff), IX(d).

All determinations regarding the size and allocation among the States of the NPM adjustment are delegated to a private group of economic consultants (dubbed "the Firm") selected by the Majors and the executive committee of the National Association of Attorneys General. MSA § IX(d)(1)(C). Determinations by the Firm are "conclusive and binding," "final and non-appealable." *Id.*

Non-compliant States thus could forfeit much of their share of payments on nationwide cigarette sales, at the cost of billions of dollars, while leaving their citizens to pay the remaining passed-through MSA costs on all cigarette sales in that State. Such potential penalties imposed "coercive" pressure on the member States to adopt and enforce the Escrow Statute, and all did. *Star Scientific Inc.* v. *Beales*, 278 F.3d 339, 359 (CA4) ("Because Virginia could face a substantial financial burden if it were not to enact a qualifying statute, the [MSA] is coercive in requiring the states to pass such a statute"), *cert. denied*, 537 U.S. 818 (2002). Louisiana state legislators cited

such penalties and pressure to justify passing the State's Escrow Statute.[4]

Third, the MSA constrains the sovereignty of its member States by allowing some States to extract revenues from cigarette sales in other States. It does so by freezing the share of MSA payments distributed to each State as of the date of the agreement, while the share of MSA payments passed on to each State's consumers rises or falls with changes in sales within each State. MSA §§ IX(c)(1), IX(j); MSA Exh. A. This renders some States net exporters and other States net importers of MSA revenues.

Fourth, the MSA encroaches upon the sovereignty of the four non-member States by requiring the tobacco companies to make payments based on their *national* market share of cigarette sales, including sales to consumers in non-member States. MSA § IX(c)(1). The MSA also restricts tobacco companies' advertising, lobbying, and litigation throughout the nation, forbidding many such activities even in non-member States. *See, e.g.*, MSA § II(rr) (definition of "State" to mean "any state of the United States" and various territories); *id.* § III(b)-(c) (ban on use of cartoons; restrictions on "Brand Name Sponsorship in any State"); *id.* § III(m) (prohibition on manufacturers supporting, "in Congress or any other forum," leg-

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[4] *Stipulated transcript of portions of hearing in Louisiana House of Representatives* (April 8, 1999), at 6, and of *Chamber Proceedings in Louisiana House of Representatives* (April 15, 1999), at 7-9 & 12-13 (statements of Louisiana legislators and Louisiana's Attorney General noting that the State had no choice but to enact the MSA's Qualifying Statute word-for-word) [R1072, R1077-79, R1082-83].

islation or rules "that would preempt, override, abrogate, or diminish" the member States' rights under the MSA). The MSA thus purports to regulate tobacco company behavior in Florida, Texas, Minnesota and Mississippi, even though those States are not parties to the agreement.

4. Given the national scope of the restrictions and their direct operation on interstate commerce, the States and the Majors initially sought to have Congress legislatively implement and provide enforcement for a precursor to the MSA proposed by the tobacco companies and various States.[5] That proposal was similar to the MSA in most relevant respects. After the Federal Trade Commission warned of its anticompetitive character, the proposal died in the Senate. 144 CONG. REC. S6479-S6481 (June 17, 1998).[6] Undeterred, the Majors and the participating

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[5] Philip Morris Companies, Inc., SEC Form 8-K Current Report, June 20, 1997 (reporting proposed settlement), available at http://www.sec.gov/Archives/edgar/data/764180/0000940180-97-000570.txt.

[6] *See* FTC, *Competition and the Financial Impact of the Proposed Tobacco Settlement* (September 1997) ("From an antitrust and economic perspective, a proposal that Congress enact a statute enabling private firms to agree to raise prices to pay past liabilities should be viewed with caution."; "there is reason to believe that cigarette prices will increase by more than is necessary simply to 'pass through' the annual payments to consumers"; "restrictions on marketing could raise barriers to entry and expansion and ultimately lead to higher prices"; provision requiring escrow payments for non-participating manufacturers "could have a disproportionate effect on the small firms at the fringe of the market as well as potential entrants * * * and may make it less likely they can effectively compete in the market"), available at www.ftc.gov/reports/tobacco/tobacco9909.shtm;

States adopted the MSA as a private agreement, without congressional involvement or approval.

5. On August 2, 2005, plaintiffs brought suit against Respondent Louisiana Attorney General Caldwell's predecessor, in his official capacity, seeking a declaratory judgment and an injunction against enforcement of the MSA and its Louisiana implementing statutes.

Plaintiffs alleged, *inter alia*, that the MSA, in conjunction with its implementing statutes, (1) constitutes an illegal agreement in restraint of trade that creates a national cartel to divide markets, suppress competition, and raise prices, in violation of federal antitrust laws, and (2) constitutes an interstate agreement, unapproved by Congress, that potentially and actually encroaches upon federal authority and upon the independent sovereign interests of both member and non-member States, in violation of the Compact Clause.[7]

6. On November 9, 2006, the district court denied defendant's motion to dismiss, except as to one claim that is no longer at issue in this case. [R9, docket entry 48]

7. On September 24, 2009, the district court denied plaintiffs' motions for summary judgment on

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Freedom Holdings v. *Spitzer*, 357 F.3d 205, 229 n.23, 230 (CA2 2004) (quoting objections from FTC Chairman Robert Pitofsky).

[7] Plaintiffs also raised claims that the MSA and its implementing legislation violated the First Amendment, conflicted with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334, violated the Commerce and Due Process Clauses, and violated the Tenth Amendment.

their remaining claims and granted defendant's motion for summary judgment as to those claims. App. B1-B22.

8. On August 20, 2010, the Fifth Circuit affirmed. App. A1-A14.

Regarding the antitrust claim, the court did not dispute the unchallenged proposition that the MSA itself was an agreement in restraint of trade and a *per se* violation of the Sherman Act. Rather, it addressed only whether defendant was entitled to invoke "state-action" immunity as originally set forth in this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943).

Plaintiffs argued that *Parker* was inapplicable to the MSA. In *Parker*, this Court explained that state-action immunity would not extend to cases where the State acts as a "participant in a private agreement or combination by others for restraint of trade," or seeks to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351-52.

The Fifth Circuit provided almost no independent analysis of this issue, relying instead on two prior cases that rejected challenges to individual state Escrow Statutes, rather than the MSA itself. App. A8-A9 (quoting *Xcaliber Int'l Ltd. LLC* v. *Caldwell*, 612 F.3d 368, 375 (CA5 2010) and *Tritent International Corp.* v. *Kentucky*, 467 F.3d 547, 557 (CA6 2006)). Viewed in isolation from the MSA, the Escrow Statutes arguably fall within the antitrust immunity doctrine of *Parker* because they are single-state statutes with only intrastate application that do not themselves require agreements or conduct illegal un-

der the antitrust laws. The MSA, by contrast, is an agreement among 46 States and numerous private companies, directly restrains trade and divides markets among its private participants, and has nationwide operation and economic effects. The Fifth Circuit did not explain how such an agreement could be entitled to antitrust immunity under *Parker*.[8]

Regarding the Compact Clause claim, the court of appeals relied upon this Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) ("*MTC*"), and upon the Fourth Circuit's decision in *Star Scientific, Inc.* v. *Beales*, 278 F.3d 339 (CA4), *cert. denied*, 537 U.S. 818 (2002), for the proposition that the Compact Clause only applies to agreements that " 'enhance[] state power *quoad* the National Government.' " App. A6 (quoting *MTC*, 434 U.S. at 473). Quoting the Fourth Circuit, the court then held that

> "the [MSA] may result in an increase in bargaining power of the States *vis-a-vis* the tobacco manufacturers, but this increase in power does not interfere with federal supremacy be-

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[8] The court also cited, without discussion, two other appellate decisions involving the MSA. *Grand River Enters. Six Nations, Ltd.* v. *Beebe*, 574 F.3d 929 (CA8 2009), *cert. denied*, 130 S. Ct. 2095 (2010); *Sanders* v. *Brown*, 504 F.3d 903 (CA9 2007), *cert. denied*, 553 U.S. 1031 (2008). App. A8-A9. Although both decisions contain dictum to the effect that the MSA was entitled to antitrust immunity, that issue was not actually presented in either case. *Grand River* involved a challenge only to an amendment to the Arkansas Escrow Statute. 574 F.3d at 932. *Sanders* addressed a challenge to post-MSA conduct, noting that the plaintiff "does not allege that the MSA itself is illegal." 504 F.3d at 906.

> cause the [MSA] 'does not purport to authorize the member States to exercise any powers they could not exercise in its absence.' "

App. A7 (quoting 278 F.3d at 360, in turn quoting *MTC*, 434 U.S. at 473). That holding effectively limited the Compact Clause to agreements to engage in conduct that would otherwise be illegal or unconstitutional for individual States.

In restricting the Compact Clause to such a narrow and unnecessary category of agreements, the court below effectively eliminated two other categories of agreements identified by this Court as being subject to the Compact Clause – those that have the *potential* for encroaching on federal authority and those that potentially or actually encroach on sister-State sovereignty. *MTC*, 434 U.S. at 472 (agreements with "potential" for encroachment); *Florida* v. *Georgia*, 58 U.S. 478, 494 (1855) (agreements that "might affect injuriously the interest of the other[]" States). The Fifth Circuit simply ignored how the MSA fit within these other categories, thus stripping the Compact Clause and this Court's cases of virtually all independent function and effect.

REASONS FOR GRANTING THE WRIT

The MSA is an unprecedented multistate and multi-company agreement that restrains trade in and stifles competition for hundreds of billions of dollars of interstate commerce, extracts billions of dollars in supra-competitive profits from consumers, and perverts core federalism principles. It establishes both a nationwide cartel among tobacco manufacturers and a nationwide economic confederacy among numerous

States without the congressional consent required by the Compact Clause.

The MSA is as undemocratic as it is anticompetitive. Congress and the state legislatures have ample authority to tax and regulate tobacco. But this should be done the old-fashioned way: by passing taxes and restrictions subject to the democratic scrutiny of the people – not by enforcing sweetheart deals drafted by industry, imposed on the entire nation without congressional involvement, and carefully insulated against repeal or democratic review.

Unfortunately, the MSA has escaped judicial as well as democratic scrutiny, by virtue of strained interpretations of antitrust immunity and Compact Clause limitations that ignore the important limits this Court has placed on those doctrines. The sheer magnitude of the private and governmental interests backing the MSA – contrasted with the relative powerlessness of the consumers and small companies injured by it – has seemingly discouraged the serious and searching judicial scrutiny one would expect of an agreement of such economic and political importance. Forty-six of the States reap billions of dollars every year as a result of the MSA, and the tobacco industry giants reap billions more. It seems too good to be true – unless you are a consumer or a small company trying to compete with the Majors and other participating manufacturers. Yet as the decision below illustrates, the courts have given a perfunctory back of the hand to challenges to the MSA. Without careful analysis or explanation, immunities have been stretched far beyond their proper scope and the Compact Clause has been rendered a redundancy.

Only this Court can bring about the judicial and congressional scrutiny required by the Sherman Act and the Constitution.

I. This Court Should Decide Whether *Parker* State-Action Immunity Should be Extended to Agreements Among Multiple States and Private Companies in Restraint of Nationwide Commerce.

As described above, at 4-10, the MSA is a collective agreement between multiple tobacco companies and numerous States that, *inter alia*, divides markets, penalizes price competition, stabilizes prices, and restricts advertising. Such an agreement is illegal under the plain and express terms of the Sherman Act, which provides that "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal." 15 U.S.C. § 1.

It is undisputed that were the MSA solely an agreement between private parties, it would be *per se* illegal.[9] Indeed, in *Freedom Holdings*, 357 F.3d at

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[9] This Court's cases firmly establish that combinations and conspiracies establishing cartels, dividing markets, and fixing prices are quintessential *per se* antitrust violations. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 406-07 (1978) (cartels); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647-49 (1980) ("combination formed for the purpose of raising * * * or stabilizing the price of a commodity"); *United States* v. *Topco Assocs.*, 405 U.S. 596 (1972) (horizontal market division); *see also Blackburn* v. *Sweeney*, 53 F.3d 825, 828 (CA7 1995) (agreements among competitors restricting advertising violate Sherman Act); *National Electrical Contractors Ass'n* v. *National Constructors Ass'n*, 678 F.2d 492, 497 (CA4 1982) (agreement between union and contractors to impose costs on some

225, the Second Circuit recognized that because "the MSA" is an "express market sharing agreement, * * * [h]ad the executives of the major tobacco companies entered into such an arrangement without the involvement of the States and their attorneys general, those executives would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines."

The Fifth Circuit's sole basis for declining to apply the Sherman Act to the MSA was the state-action immunity defense originally articulated by this Court in *Parker* v. *Brown*. App. A7-A10.

In *Parker*, this Court, relying on principles of federalism and state sovereignty, declined to "lightly" attribute to Congress, in enacting the Sherman Act, an intention to "restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. Reviewing a California marketing statute that restricted competition among raisin growers, this Court observed that a State was presumptively free to direct its officers and agents to regulate its own markets. *Id.*; *see id.* at 359-60 (the "governments of the states are sovereign within their territory").

Absent any specifically expressed congressional intent to limit state legislative activity, and finding that the State "as sovereign" had "imposed the restraint as an act of government" rather than by making an "agreement or contract" or by entering into a "conspiracy in restraint of trade," this Court held that

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competitors to compensate for costs voluntarily assumed by other competitors is a *per se* illegal attempt to "stabilize prices").

the state program at issue was not prohibited by the Sherman Act. *Id.* at 352.

This Court included the proviso, however, that even state action will not avoid the prohibitions of the Sherman Act if the State acts as a "participant in a private agreement or combination by others for restraint of trade," or seeks to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351-52.

The Fifth Circuit below relied upon the *Parker* state-action doctrine to find the MSA immune from the Sherman Act. Erroneously adopting the Sixth Circuit's reasoning rejecting a challenge to Kentucky's Escrow Statute, rather than to the MSA as a whole, the court discussed only the indirect effects of the *statute* on price competition. Observing that diminished price competition was " 'neither mandated nor specifically authorized by the State,' " the court held that the Escrow Statute was entitled to state-action immunity. App. A9 (quoting *Tritent*, 467 F.3d at 557).

The Sixth Circuit's analysis of whether the Escrow Statute alone compels or authorizes subsequent illegal activity is largely beside the point. The question in this case is whether, by joining and condoning an admittedly *per se* illegal agreement between private parties, Louisiana and other States have conferred *Parker* immunity on the MSA. Under the express limits of the *Parker* decision and its fundamental rationale, state-action immunity does not apply to the MSA.

First, *Parker* specifically distinguished between the imposition by a single State of a "restraint [on trade] as an act of government," which is presumed immune from the antitrust laws, and conduct by a State that constitutes an "agreement or contract" or a "conspiracy" with private parties, which remains subject to antitrust scrutiny. 317 U.S. at 352 *Parker* was quite explicit in excluding from immunity those cases where the State acts as a "participant in a private agreement or combination by others for restraint of trade" or seeks to "authoriz[e]" such an agreement, *id.* at 351-52, and that exclusion squarely applies to the MSA.[10]

Second, the *Parker* doctrine only shields regulations within individual States, not national cartels like the MSA. *See Northern Securities Co.* v. *United States*, 193 U.S. 197, 346 (1904) (State may not "give a corporation * * * authority to restrain interstate or international commerce"). This Court has never applied *Parker* outside the single-state context, and certainly not to a multistate and multi-competitor agreement restricting nationwide interstate commerce. The very premise of *Parker* was that federalism and state sovereignty provided some presumptive protection to State conduct within a State's limited sphere of sovereignty – and required an express statement of congressional intent to overcome that presumptive sovereignty. *Parker*, 317 U.S. at 350; *cf. id.* at 359-60 (emphasizing, in discussing the related

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[10] Furthermore, the decision by Louisiana's Attorney General to enter into the MSA was not conduct "directed by its legislature," as described in *Parker*. 317 U.S. at 350-51. The MSA preceded any state legislation.

Commerce Clause challenge, that "states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution," or conflict with national powers or legislation).

The decision below turns *Parker*'s premises and presumptions on their heads. Rather than making independent choices regarding matters wholly "within their territory," the MSA States have acted *collectively*, via agreements with private industry, to divide markets, raise prices, and restrict advertising nationwide, even in the four non-MSA States. *Supra* at 4. Far from being legislation internal to each State, the MSA virtually compelled state participation by imposing costs on consumers in all 50 States, while distributing benefits only to those state governments that joined the agreement. Such collective, coercive, and extraterritorial regulation flies in the face of the federalism interests animating *Parker*. *See Lafayette*, 435 U.S. at 406-07 (conduct's extraterritorial reach, involving buyers outside the defendant city, militated against granting immunity).

Third, the federalism virtues of local control and political accountability – thought by this Court to mitigate any potential consequences of individual state choices to restrict competition – have no application to the MSA, which has collectivized the decision-making of the States and removed *both* local control and political accountability. *Cf. Hallie* v. *Eau Claire*, 471 U.S. 34, 45 n.9 (1985) (distinguishing municipal from private anticompetitive conduct permitted by State because "the electoral process * * * may provide some greater protection against antitrust abuses than exists for private parties").

As noted above, at 9 n.4, Louisiana legislators acknowledged during debate over passage of the qualifying Escrow Statute that they had no choice but to enact it word for word. Moreover, having joined the MSA, they may not withdraw from it, have no recourse regarding the decisions of the Firm, and are forbidden from challenging the MSA in virtually any way. *Supra* at 7-8. Individual States may not alter the MSA without the unanimous consent of the other affected parties, MSA § XVIII(j). States are therefore forbidden to adapt their law to local conditions or to respond to local political pressures. The people of Louisiana cannot bring about democratic change via elections because the Attorney General who signed the MSA bound all future state officials in perpetuity. MSA § XVIII(g). Contrary to the democratic premises of *Parker*, the citizens of States that are part of the MSA have no means, either through the "electoral process" or "public scrutiny," of holding their officials accountable on matters governed by the MSA. *Hallie*, 471 U.S. at 45 n.9. And, of course, the four non-MSA States and their citizens have no say whatsoever over the behavior of the MSA States. *See Lafayette*, 435 U.S. at 406 ("consumers living outside the municipality * * * have no recourse at the municipal level").

Fourth, even *Parker*'s basic premises of reserved state sovereignty, limited federal power, and the presumed congressional reluctance to interfere with state prerogatives do not apply to an *agreement* between States as opposed to independent state action. As explained in the following section, the Compact Clause expressly limits state authority to enter into certain agreements with other States, requires affir-

mative congressional approval for such agreements, and consequently reverses the ordinary federalism presumptions and permissive default rule applied in challenges to individual state action.

Finally, because "state action immunity is disfavored, much as are repeals by implication," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), it should not be extended to cover an agreement imposing extraterritorial regulation of national scope, like the MSA. Unlike in *Parker*, the relevant implications from the Constitution's terms and structure cut in *favor* of enforcing the Sherman Act strictly against multistate agreements in restraint of trade, and thus there is no justification for judicially narrowing the plain terms of the Sherman Act.

II. The Decision Below Strips the Compact Clause of All Independent Meaning.

In addition to being an agreement among competitors, joined by the States, the MSA also is an agreement between and among the member States themselves, falling within the express terms of the Compact Clause. That Clause provides that "[n]o state shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign power." U.S. CONST., Art. I, § 10, cl. 3.

In constructing our system of federalism, the Framers were sensitive not only to the need to limit the national government and preserve state sovereignty, but also to the dangers posed by competing combinations of States with each other or with foreign nations. Such combinations threatened to interfere

with the careful balance of state independence and national collective action contemplated by the Constitution. To avoid those dangers, the Constitution strictly forbade States to "enter into any Treaty, Alliance, or Confederation" and required congressional consent for any state "Agreement or Compact" with other States or with foreign nations. U.S. CONST., Art. I, § 10, cl. 1 & 3.

As this Court has recognized, the purpose of that latter restriction, the Compact Clause, is "to guard against the derangement of [compacting States'] federal relations with other States of the Union, and the federal government; which might be injuriously affected." *Rhode Island* v. *Massachusetts*, 37 U.S. 657, 726 (1838). It achieves this purpose by "ensur[ing] that whatever sovereignty a State possesses within its own sphere of authority ends at its political border." *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 315 (1990).

In order to prevent the Compact Clause from overstepping its purpose, this Court has observed that it should not be read too literally to encompass *every* possible agreement between States, lest it cover agreements "to which the United States can have no possible objection or have any interest in interfering with." *Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1883). There nonetheless remains a sizeable category of interstate agreements that *are* objectionable or of interest to the United States.

Some agreements – those of an overtly political character – are absolutely prohibited by the Treaty

Clause of Article I. U.S. CONST., Art I, § 10, cl. 1.[11] Other agreements, involving " 'what might be deemed mere private rights of sovereignty; such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other' " are permissible only with the consent of Congress. 148 U.S. at 519 (quoting J. Story, *Commentaries* § 1403).

This Court's cases have identified three basic qualities of agreements that are subject to the Compact Clause:

- The Compact Clause applies to *binding* agreements between States, not mere coordination, voluntary cooperation, or reciprocity. *Virginia* v. *Tennessee*, 148 U.S. at 520-21 ("Compacts or agreements * * * cover all stipulations affecting the conduct or claims of the parties"; "no compact or agreement between the states in this case * * * until they had * * * mutually declared the boundary established by them to be the true and real boundary between the states," each "in consideration of the ratification of the other").

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[11] *Virginia* v. *Tennessee*, 148 U.S. at 519 (Treaty Clause prohibits agreements of a political character " 'in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges' ") (quoting J. Story, *Commentaries* § 1403).

- The Compact Clause applies to agreements that "*may* lead * * * to the increase of the political power or influence of the states affected, and thus encroach * * * upon the full and free exercise of federal authority." *Id.* at 520 (emphasis added).

- The Compact Clause applies to agreements that "*might* affect injuriously the interest of the other[]" States, *Florida* v. *Georgia*, 58 U.S. at 494 (emphasis added).

Over the years a variety of interstate compacts have been submitted to Congress, and Congress has not hesitated to impose conditions on its approval in order to protect federal interests. *See* Michael Greve, *Compacts, Cartels, and Congressional Consent*, 68 Mo. L. Rev. 285, 288-89, 326-28 (2003) (over 200 interstate compacts on numerous subjects, including environmental and energy policy, crime control, education, and limits on competition regarding commodities or natural resources; imposition of periodic reapproval requirements for dairy and oil and gas compacts).

In the leading modern case on the Compact Clause, *United States Steel Corp.* v. *Multistate Tax Commission*, this Court endorsed its earlier observations in *Virginia* v. *Tennessee*, and used them to evaluate a voluntary agreement among various States designed to coordinate taxation of business income earned in multiple States. Recognizing the underlying purposes of the Compact Clause, this Court agreed that the "pertinent inquiry is one of *potential*, rather than actual, impact upon federal supremacy."

434 U.S. at 472 (emphasis added). Even so, it concluded that the benign character of the agreement placed it outside the concerns of the Compact Clause.

Unlike the MSA – or the binding agreement in *Virginia* v. *Tennessee* – the agreement in *MTC* was not binding, but was wholly voluntary and States could (and did) withdraw unilaterally at any time. *Id.* at 454 n.1, 457. Given the exit threat, the voluntary coordination provided in *MTC* posed no danger of hindering the independence of and competition among the States. The agreement in *MTC* involved no "delegation of sovereign power" from the States and each participating State retained "complete control over all legislation and administrative action" regarding taxes, and the authority "to reject, disregard, amend or modify any rules" of the Commission without penalty, "just as it could if the compact did not exist." *Id.* at 473, 477-78.

Unlike the MSA's restrictions on trade in the national tobacco market, its extraterritorial fees and prohibitions, and its restrictions on speech, nothing in the *MTC* agreement even "touche[d] upon constitutional strictures." *Id.* at 478. Indeed, the agreement in *MTC* actually provided voluntary coordination in *furtherance* of avoiding constitutional and federal concerns regarding multiple taxation of interstate businesses. *Id.* at 455-56. The agreement thus did not even potentially encroach upon federal authority.

And, unlike the nationwide fees, structured payments, and fixed distributions under the MSA, there was nothing in the *MTC* agreement that would "redound to the benefit of any particular group of States or to the harm of others." *Id.* at 477.

Given the limited and innocuous scope of the agreement in *MTC*, this Court concluded that it posed no threat to federal authority or state rights and interests and consequently was not subject to the Compact Clause.

In rejecting application of the Compact Clause to the MSA, the Fifth Circuit in the present case adopted an unreasonably narrow construction that ignored the holding and lessons of *MTC* and rendered the Clause redundant with the Supremacy Clause. App. A5-A7. Offering no analysis of its own, the court below adopted the cursory reasoning of the Fourth Circuit in *Star Scientific*, which found no encroachment upon federal authority because the MSA did not authorize conduct otherwise forbidden to the States individually and because the MSA acknowledged the primacy of federal law in the event of any conflict. 278 F.3d at 359-60. Neither *Star Scientific* nor the court below addressed the significant differences between the MSA and the agreement in *MTC*, and neither court engaged in the "pertinent inquiry" whether the MSA involves "potential, rather than actual, encroachment." *MTC*, 434 U.S. at 472.

Both the court below and the Fourth Circuit were wrong in their construction of the Compact Clause and in upholding the MSA pursuant to that overly narrow construction. The MSA is a binding agreement among numerous States that, at a minimum, potentially encroaches on federal sovereignty and sister-state authority and interests.

A. The MSA Is a Binding Agreement Among Its Member States.

As noted above, *supra* at 7-9, 26, the MSA goes well beyond the mere voluntary coordination in *MTC* and imposes binding and perpetual obligations on the States, controls "the conduct [and] claims of the parties, *Virginia* v. *Tennessee*, 148 U.S. at 520, and penalizes non-compliance. The MSA is, in fact, the polar opposite of the agreement in *MTC* in this constitutionally critical dimension. It effectively coerced States into joining and severely constrains their behavior such that they are not free to act "just as [they] could if the compact did not exist." *MTC*, 434 U.S. at 477-78.

B. The MSA Potentially and Actually Encroaches upon Federal Supremacy.

As emphasized by this Court in *MTC*, the Compact Clause protects against even "potential" encroachments on federal sovereignty, not merely against actual conflicts.

The court below and the Fourth Circuit, however, narrowed their Compact Clause analysis to whether the MSA purported to authorize its member-States "to exercise any powers they could not exercise" individually. App. A7; *Star Scientific*, 278 F.3d at 360; *see also id.* (MSA "does not derogate from the power of the federal government" because it acknowledges the supremacy of current or future conflicting federal legislation). But the only "powers" individual States may not exercise are those actually preempted by federal law or forbidden them by the Constitution. If the test for applying the Compact Clause is solely

whether an agreement purports to authorize conduct otherwise preempted or unconstitutional as to individual States, then this Court's distinction between potential and actual encroachment on federal supremacy is eliminated and the Compact Clause is rendered entirely redundant. Such a narrow construction of the Clause would have no operation beyond situations already covered by the Supremacy Clause, the Commerce Clause, or other constitutional limits on state action. "It cannot be presumed," however, "that any clause in the constitution is intended to be without effect." *Marbury* v. *Madison*, 5 U.S. 137, 174 (1803). [12]

A focus on potential, rather than actual, encroachment provides the necessary independent effect to the Compact Clause. States acting individually have the power to legislate in ways that potentially conflict with federal supremacy, so long as state law does not actually conflict with such supremacy. In close or ambiguous cases, courts apply a default rule – based on federalism principles of state sovereignty and limited national powers – that operates to sustain state laws absent an actual and "irreconcilable conflict * * *. The existence of a hypothetical or potential conflict is insufficient." *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982). But for *agreements* between States, the Compact Clause and this Court's cases reverse the default rule: agreements to

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[12] Were that a correct reading of *MTC* – though it is not – it would make *MTC* an inappropriate and "[in]effective alternative" to "a literal reading of the Compact Clause," *MTC*, 434 U.S. at 460, and call for this Court to modify or overrule *MTC* in order to provide some meaning for the Compact Clause.

engage in conduct having precisely the same "potential" for conflict are invalid absent congressional consent. That *prophylactic* default rule protects federal prerogatives regarding interstate agreements and places the risk of "false negatives" in ambiguous cases on the States rather than on Congress. *See* Greve, 68 Mo. L. Rev. at 317 (usual presumption under the Supremacy or dormant Commerce Clause "will produce a number of 'false negatives' – that is, unaddressed offenses against national rights and prerogatives," with Congress bearing the burden to correct such results). [13]

Under a proper reading of the Compact Clause, the MSA is invalid absent congressional consent because it raises no lack of potential conflicts with federal supremacy:

- As the debate in Congress over the proposed legislative precursor to the MSA shows, *see supra* at 10, the MSA has at least the potential to encroach upon federal authority concerning interstate competition and antitrust law. The Federal Trade Commission issued a report warning that the proposed legislation, which was comparable to the MSA in relevant respects, could "raise barriers to entry and

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[13] Applying the Compact Clause's restrictive default rule to interstate agreements, rather than the permissive default rule applied to individual state statutes, does not undermine principles of judicial restraint. Rather, the Compact Clause rule eliminates the need for judicial speculation regarding congressional intent in cases of potential or uncertain conflict, and shifts the resolution of any conflicting legal or policy concerns away from the courts and back to Congress, where it belongs.

expansion," enable companies to raise prices "by more than is necessary" to pass through settlement costs, and "have a disproportionate effect on" NPMs, stifling their ability to "effectively compete in the market." *Supra* at 10 n.6. Because of such concerns, Congress declined to enact the proposed legislation. It should be obvious that an agreement among the States and the tobacco industry to do precisely what Congress decided not to do – and that violates the plain text of the Sherman Act – is at least a "potential" infringement on federal authority.[14]

- The MSA's extraterritorial fees on national cigarette sales and restrictions on national advertising, lobbying, and litigation, even in States that are not parties to the MSA, likewise establish *at least* the potential for encroachment on federal authority.[15] Congress

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[14] The existence of at least a potential conflict also is reflected in the Fifth Circuit's reliance on *Parker*'s disfavored and counter-textual implied immunity. And Congress certainly has viewed anticompetitive multistate agreements as encroaching upon its authority sufficiently to warrant greater national supervision through protective conditions on its consent, without regard to the prospect of *Parker* immunity. *E.g.*, 73 Stat. 290 (1959) (requiring periodic resubmission of the Oil & Gas Compact, forbidding state cartels or price stabilization (Art. V), and ordering attorney general to investigate whether it promotes monopoly).

[15] The Fifth Circuit did not even address such extraterritorial restrictions, but instead held that the *Escrow Statute* had no extraterritorial application, an issue that was not in contention on appeal. App. A10-A11.

has itself imposed restrictions on advertising, sometimes choosing expressly to preempt contrary or additional state requirements. 15 U.S.C. § 1334. Even apart from congressional legislation, extraterritorial action is outside the authority of individual States. *See Healy* v. *Beer Institute,* 491 U.S. 324, 336 (1989) (Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."); *Miller Bros.* v. *Maryland*, 347 U.S. 340, 342 (1954) ("no principle is better settled than that the power of a State * * * in respect to property, is limited to such as is within its jurisdiction").

- The MSA has at least the *potential* to interfere with Congress's access to unfettered information and opinion regarding matters of national importance. One remarkable feature of the MSA is that it forbids both private and governmental members from taking positions adverse to it. Companies may not challenge the MSA or even lobby Congress or the States in any manner opposed to the MSA. MSA § III(m). States likewise must "support the integrity and enforcement of" the MSA and may not "directly or indirectly" support any challenge to the MSA. MSA § XVIII(*l*). Such binding and perpetual gag rules barring communication with Congress on subjects within congressional jurisdiction has long been recognized in other contexts as having

the potential to encroach upon federal sovereignty. *Cf. United States* v. *Cruikshank*, 92 U.S. 542, 552-53 (1876) (right to petition Congress is "an attribute of national citizenship" and a right "within the scope of the sovereignty of the United States").

C. The MSA Potentially and Actually Encroaches upon State Authority and Interests.

A further purpose of the Compact Clause is to protect the States from agreements that "might affect injuriously the interest of the other[]" States or "derange[]" States' "federal relations with other States. *Florida* v. *Georgia*, 58 U.S. at 494; *Rhode Island* v. *Massachusetts*, 37 U.S. at 726. The Fourth Circuit and the court of appeals below entirely ignored the MSA's encroachment on sister-state interests, effectively excising this component of the Compact Clause's purpose and reach.

The MSA, once again, raises no lack of potential injury and derangement to be covered by the Compact Clause:

- The MSA's extraterritorial fees and restrictions manifestly encroach upon the sovereignty of non-member States, in addition to encroaching on federal supremacy. *See supra* at 31-32.

- The MSA severely restricts the sovereignty of its member States. State legislatures were coerced into adopting Escrow Statutes when presented with the MSA as a *fait acompli* by the Attorneys General and the tobacco com-

> panies, and faced severe penalties for non-compliance. The agreement is binding on the States, which may not withdraw from and may not modify the agreement without unanimous consent from affected parties. The agreement effectively allows some member States to tax cigarette sales in other member States. Member States are subject to the binding determinations of a non-public body – the Firm – which issues unappealable decisions regarding compliance and the distribution of MSA proceeds. And States may not even voice their objections to the MSA, which forbids them from taking positions adverse to it. *See supra* at 7-10. Such multilateral restrictions on sister States could not be attempted legally, or accomplished effectively, by individual States acting without the aid of an enforceable agreement.

Once again, the MSA is the polar opposite of the agreement in *MTC*, unquestionably "redound[ing] to the benefit of [a] particular group of States [and] to the harm of others." *MTC*, 434 U.S. at 477-78.

This Court should grant certiorari both to correct the constitutionally destructive legal standard applied by the court below and the Fourth Circuit, and to decide whether a binding agreement as sweeping and significant as the MSA is indeed subject to the Compact Clause.

III. This Petition Presents Important Issues Having a Tremendous Impact on the National Economy and Our Federal System.

This case presents issues of tremendous national importance that should be resolved by this Court.

The absence of a split regarding the MSA in no way undermines the importance of the questions presented and is not a sufficient reason to decline review. Compact Clause cases rarely generate a circuit split, yet still receive this Court's attention. *See, e.g.*, *Northeast Bancorp* v. *Board of Governors of the Federal Reserve Sys.*, 472 U.S. 159, 162 (1985). Cases involving related structural restraints in Article I, § 10, cl. 3 – such as the Tonnage Clause – likewise have been reviewed by this Court even in the absence of a split. *See, e.g.*, *Polar Tankers, Inc.* v. *City of Valdez*, 129 S. Ct. 2277, 2281 (2009).

This Court has repeatedly recognized that a circuit split is not the *sine qua non* of reviewability for cases involving issues of sufficient economic or legal importance. This Term alone, this Court has granted several petitions that have not alleged any split – merely important or economically significant questions. *See, e.g.*, Petition at 5, *Schwarzenegger* v. *Entertainment Merchants Ass'n* (No. 08-1448) (May 19, 2009) (acknowledging lack of a split); Petition at 8, *Costco Wholesale Corp.* v. *Omega, S.A.* (No. 08-1423) (May 18, 2009) (same); Petition, *Flores-Villar* v. *United States* (No. 09-5801) (Aug. 3, 2009) (no split alleged); Petition at 11-12, *Chamber of Commerce* v. *Candelaria*, (No. 09-115) (July 24, 2009) (same).

And there can be little doubt that this case presents issues of great economic, political, and legal importance.

Economically, the MSA annually regulates roughly $80 billion in national cigarette sales and literally *trillions* of dollars in sales over the life of the agreement. By suppressing competition, the MSA raises prices by many billions of dollars each year, with the States and participating tobacco companies splitting the supra-competitive profits. On sheer dollar value alone, this case is significant enough to warrant this Court's attention.

Politically, the MSA has allowed an independent confederacy of States to extract revenues from citizens across the nation without passing a tax through normal democratic processes, and without political accountability in individual States. Because the MSA is binding on present and future officials, they can disclaim responsibility and cannot alter or withdraw from the MSA regardless of electoral outcomes. Such bold circumvention of democratic processes is of deep concern for its own sake, for the precedent it sets, and for the damage it does to our system of federalism and its division of power and responsibility. *See, e.g*, *United States* v. *Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (benefits of federalism in enhancing liberty require "distinct and discernable lines of political accountability"; "the inability to hold either branch of government answerable to the citi-

zens is more dangerous even than devolving too much authority to the remote central power").[16]

Legally, the court below and other federal courts have dismissed the MSA's serious legal and constitutional failings by casually extending implied immunity under the Sherman Act and by narrowing the scope of the Compact Clause in ways that have no precedent in this Court's cases, go far beyond the contexts of the cases they cite, disregard and indeed pervert the underlying reasoning in those cases, and conflict with the plain statutory and constitutional texts at issue. These rulings severely undermine the Sherman Act, effectively nullify the Compact Clause, and overreach the role of lower courts by expanding this Court's limited cases to the detriment of a federal statute and the Constitution. That the federal courts have uniformly committed such errors in sustaining the MSA simply makes matters worse, and highlights the necessity for this Court to step in as final arbiter.

In short, the MSA is an economic, political, and legal abomination backed by powerful vested interests and upheld by inadequate and destructive legal reasoning. This is the only Court in a position to offer an authoritative and definitive evaluation of that scheme and to decide whether it is indeed as innocuous as its supporters claim, or whether it must be

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[16] This case is *not* about the merits of regulating cigarettes or the desirability of higher prices to deter smoking. It is about the manner in which such choices are to be made, and who will be accountable for those choices. There are sufficient means of regulating and taxing cigarettes – including submitting the MSA to Congress for approval – that do not trench on democratic processes or federal authority.

invalidated as incompatible with federal law and the Compact Clause.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: November 8, 2010

APPENDICES

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APPENDIX A

614 F.3d 172

United States Court of Appeals,
Fifth Circuit.

S&M BRANDS, INC.; Tobacco Discount House # 1, Inc.; Mark Heacock, Plaintiffs-Appellants,

v.

James D. "Buddy" CALDWELL, in his official capacity as Attorney General State of Louisiana, Defendant-Appellee.

No. 09-30985.

Aug. 10, 2010.

Appeal from the United States District Court for the Western District of Louisiana.

Before DAVIS, SMITH and HAYNES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Plaintiffs appeal the district court's grant of summary judgment in favor of the Attorney General of Louisiana. This case arises out of the Master Settlement Agreement ("MSA") reached in the 1990s between the four largest tobacco manufacturers and the several states. The plaintiffs-who are not signatories to the MSA-sued the Louisiana Attorney General, alleging that the MSA and the Louisiana*174 Escrow Statute, LA.REV.STAT. § 13:5061, *et seq.*, violate the Compact Clause, First Amendment, Federal Ciga-

rette Labeling and Advertising Act ("FCLAA"), Commerce and Due Process Clauses, and federal antitrust laws. For the following reasons, we AFFIRM.

I.

In 1994, several states, including Louisiana, brought lawsuits against the four largest tobacco manufacturers: Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson (collectively referred to as the Original Participating Manufacturers "OPMs"). The states alleged that the OPMs' tobacco products, as well as the marketing related to their tobacco products, cost the states billions of dollars in increased health care costs.

In 1998, the OPMs reached a settlement agreement, the MSA, with fifty-two governmental entities (collectively referred to as the "Settling States"), including Louisiana. The MSA released the OPMs from past, present, and future tobacco-related legal claims. In return, the OPMs were prohibited from participating in certain types of tobacco-related state and federal lobbying, engaging in litigation adverse to the MSA or its enacting state statutes, and various types of advertising. The OPMs also were required to make annual payments into a fund (hereinafter "the MSA fund") based on their present market share. Money paid into the MSA fund is paid out in fixed shares to the individual Settling States.

Smaller tobacco manufacturers that were not part of the OPMs were permitted to join the MSA as Subsequent Participating Manufacturers ("SPMs"). The MSA created two groups of SPMs. The first group (hereinafter the "grandfathered SPMs") included those SPMs that signed on to the MSA within the

first 90 days of its execution. As a means of encouraging smaller tobacco manufacturers to become grandfathered SPMs, the MSA provides that grandfathered SPMs do not have to pay into the MSA fund, so long as their market share does not exceed the greater of their 1998 sales or 125% of their 1997 sales. The second group (hereinafter the "non-grandfathered SPMs") are those SPMs that joined the MSA after 90 days of its execution. Non-grandfathered SPMs must pay into the MSA fund based on their annual market share, but unlike grandfathered SPMs, they need not remain at the same market size as when the MSA was executed. Both grandfathered SPMs and non-grandfathered SPMs must abide by the aforementioned prohibitions in lobbying, litigation, and advertising that OPMs are subject to under the MSA.

In return for the above concessions, the MSA encourages, but does not demand, that the Settling States pass a Model Statute (hereinafter the "Escrow Statute"). The Escrow Statute requires that tobacco manufacturers not participating in the MSA (referred to as Non-Participating Manufacturers ("NPMs")) and selling tobacco products in the state either (1) join the MSA or (2) make an annual deposit into a qualified escrow account based on the quantity of cigarettes the NPM sold in the state during the previous calendar year. To encourage the Settling States to pass the Escrow Statute, the NPM Adjustment was created. The MSA provides that if any of the OPMs, grandfathered SPMs, or non-grandfathered SPMs (collectively the "PMs") lose its market share, a nationally-recognized firm of economists will be hired to determine whether the loss in market share is due to

the aforementioned restraints in lobbying, litigation, and advertising required by the MSA. If those restraints are determined by the economists to be a significant factor contributing*175? to the loss of market share, then the PM may reduce the amount it pays into the MSA fund. This reduction is the NPM Adjustment, which is borne only by the Settling States that have not enacted the Escrow Statute. Louisiana enacted an Escrow Statute, LA.REV.STAT. § 13:5061, *et seq.* Under the Louisiana Escrow Statute, if an NPM fails to join the MSA or fails to make the appro-priate annual deposit into a qualified escrow account, the NPM is subject to civil and criminal penalties. LA.REV.STAT. §§ 13:5073, 5076. However, if an NPM pays more to the qualified escrow account than it would have to pay if it were a non-grandfathered SPM, the NPM is entitled to a refund of the excess amount it paid. LA.REV.STAT. § 13:5063(C)(2)(b).

II.

Since its implementation, several NPMs and smokers have challenged the validity of the MSA and state Escrow Statutes before a number of courts, including, most recently, this court.[1] This case is yet another challenge to the MSA and Louisiana Escrow Statute.

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[1] *See, e.g., Xcaliber Int'l Ltd. LLC v. Caldwell,* No. 09-30492, 612 F.3d 368, 2010 WL 2773431, 2010 U.S.App. LEXIS 14513 (5th Cir. Jul. 15, 2010); *Grand River Enters. Six Nations v. Beebe,* 574 F.3d 929 (8th Cir. 2009); *KT&G Corp. v. Six,* 535 F.3d 1114 (10th Cir. 2008); *Grand River Enters. Six Nations v. Pryor,* 425 F.3d 158 (2d Cir. 2005); *Star Sci., Inc. v. Beales,* 278 F.3d 339 (4th Cir. 2002).

The plaintiffs[2] filed suit against the defendant, Louisiana Attorney General Buddy Caldwell, seeking to invalidate the MSA and Louisiana Escrow Statute on the grounds that they were unconstitutional because they violated the Compact Clause, the First Amendment, the Commerce Clause, and the Due Process Clause. The plaintiffs further alleged the MSA and Escrow Statute violated federal antitrust laws, the FCLAA, and the Bankruptcy Code.

Following proceedings before the district court, both parties filed motions for summary judgment. Finding there were no genuine issues of material fact, and that the plaintiffs' claims failed as a matter of law, the district court granted the Attorney General's motion for summary judgment and dismissed the plaintiffs' claims with prejudice. The plaintiffs timely filed this appeal. On appeal, the plaintiffs press all of the aforementioned challenges except for their allegation that the MSA and Escrow Statute violate the Bankruptcy Code.

We review the district court's grant of summary judgment *de novo*. *Breaux v. Halliburton Energy Services,* 562 F.3d 358, 364 (5th Cir. 2009) (citing *LeMaire v. La. Dep't of Transp. & Dev.,* 480 F.3d 383, 386 (5th Cir. 2007)).

III.

We first address the plaintiffs' assertion that the MSA violates the Compact Clause, U.S. CONST., Art.

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[2] The specific parties in this case include a cigarette manufacturer who has not joined the MSA, i.e. an NPM (S&M Brands, Inc.), a cigarette dealer (Tobacco Discount House # 1), and a smoker (Mark Heacock) (collectively, "the plaintiffs").

I, § 10, cl. 3, because it is an agreement among the Settling States that has the potential to interfere with the plaintiffs' constitutional rights and has not been approved by Congress. The district court found that the proper analysis to determine whether congressional approval is required under the Compact Clause is the test provided in *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 473, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978): "whether ***176** the Compact enhances state power *quoad* the National Government." Because the MSA only increases states' power *vis-a-vis* the PMs and not in relation to the federal government, the district court concluded there was no violation of the Compact Clause.

The Fourth Circuit in *Star Sci.* reached this same end. *See* 278 F.3d at 359-60. The *Star Sci.* court stated:

> Although the Master Settlement Agreement implicates the Compact Clause, we see no reason to conclude that it encroaches on federal power. In *Multistate Tax Commission,* the Supreme Court upheld a compact resulting in reciprocal State legislation and establishing an administrative body to coordinate State taxation of certain entities. The Court noted that the compact might result in an increase in bargaining power of the member States with respect to the corporations subject to their taxing jurisdictions, but it found such an increase in power to be acceptable because "the test is whether the Compact enhances state power quoad the National Government." Similarly,

> the Master Settlement Agreement may result in an increase in bargaining power of the States *vis-a-vis* the tobacco manufacturers, but this increase in power does not interfere with federal supremacy because the Master Settlement Agreement "does not purport to authorize the member States to exercise any powers they could not exercise in its absence."

278 F.3d at 360. *See also Vibo Corp. v. Conway,* 594 F.Supp.2d 758, 785-86 (W.D. Ky. 2009) (finding that the MSA does not violate the Compact Clause because "[a]n increase in the states' collective bargaining power does not result in an accompanying decrease of federal power").

We agree with the reasoning expressed by the Fourth Circuit and the district court in the instant case, and accordingly find no merit in the plaintiffs' Compact Clause challenge.

IV.

The plaintiffs also argue that the MSA and Escrow Statute are *per se* violations of the Sherman Act, 15 U.S.C. § 1, because the structure of the MSA creates a national cigarette cartel designed to increase the prices paid out to the OPMs and protect the OPMs market share. The plaintiffs further assert that the only defense potentially available to the Attorney General is the implied state-action immunity found under *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), but that such immunity does not apply in this case where Louisiana acted as a private player when it entered an agreement with other states and the OPMs to restrain trade.

The plaintiffs' argument that the Escrow Statute is a *per se* violation of the Sherman Act is foreclosed by this court's recent decision in *Xcaliber*. The *Xcaliber* court concluded that the Escrow Statute did not "mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases." 612 F.3d 368, 375, 2010 WL 2773431, *4, 2010 U.S.App. LEXIS 14513, at *14 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 661, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982)). Moreover, the *Xcaliber* court found that the Escrow Statute did not "pressure [NPMs] to conspire together to set a specific price, to carve up markets, or otherwise to violate antitrust law." *Id.* (citation omitted). Thus, this court's precedent in *Xcaliber* precludes the plaintiffs' argument that the Escrow Statute violates the Sherman Act.

This court's decision in *Xcaliber,* however, does not complete our antitrust analysis. In *Xcaliber,* the court was faced with *177 a challenge to only the Escrow Statute. *See id.* at 375, 2010 WL 2773431, *3 n. 5, 2010 U.S.App. LEXIS 14513 *12 n. 5. In the present case, the plaintiffs challenge both the Escrow Statute *and* the MSA. Thus, we must also consider whether the MSA and Escrow Statute working together create an antitrust violation.

Whether the MSA and Escrow Statute violate federal antitrust laws has been addressed by the Sixth, Eighth, and Ninth Circuits, and all of those courts have rejected the plaintiffs' arguments. *See Grand River Enters. Six Nations,* 574 F.3d at 936-38; *Sanders v. Brown,* 504 F.3d 903, 908-11 (9th Cir. 2007); *Tritent Int'l Corp. v. Kentucky,* 467 F.3d 547, 557

(6th Cir. 2006). *See also S&M Brands, Inc. v. Summers,* 393 F.Supp.2d 604, 622 (M.D. Tenn. 2005), *aff'd by, S&M Brands, Inc. v. Summers,* 228 Fed.Appx. 560 (6th Cir. 2007) (finding that the MSA and Escrow Statute were immune from challenge on antitrust grounds under the state-action doctrine). The Sixth Circuit in *Tritent* aptly described the argument the present plaintiffs raise and why it must be rejected:

> The PMs' practice of increasing cigarette prices, thus keeping sales volume down, has allowed them to maintain a stable market share. This has resulted in lower payments to the settling states. If Tritent and the other NPMs had chosen not to raise their prices in response to the PMs' price increase, the NPMs' market share would have presumably increased, but this would have subjected them to higher payments under the Escrow Statute. Kentucky's current statutory scheme ... thus provides a disincentive for the NPMs to engage in price competition with the PMs. The genesis of this anticompetitive behavior, however, stemmed neither from the MSA nor the complementary legislation that Kentucky enacted to give effect to the MSA's provisions. Instead, the behavior with which Tritent *really* takes issue is the behavior of the PMs following the MSA's enactment. Because such behavior was neither mandated nor explicitly authorized by the state of Kentucky, *McNeilus* [*Truck & Mfg., Inc. v. State ex rel. Montgomery,* 226

> F.3d 429 (6th Cir.2000)] forecloses Tritent's argument on this issue.

467 F.3d at 557.

We agree with the Sixth Circuit and the other circuits that have already considered the issue of whether the MSA and Escrow Statute violate the Sherman Act, and we adopt their rationale. Accordingly, we find no merit to the plaintiffs arguments that the MSA and Escrow Statute violate federal antitrust laws.

V.

The plaintiffs also briefly argue that the MSA and Escrow Statute violate the Commerce Clause and Due Process Clause because they create extraterritorial price increases.

The plaintiffs' claims have been soundly rejected by the Fourth, Eighth, and Tenth Circuits. *See Grand River Enters. Six Nations,* 574 F.3d at 943-44; *KT&G Corp.,* 535 F.3d at 1145-46; *Star Sci., Inc.,* 278 F.3d at 356-57. In examining whether the Arkansas Escrow Statute created extraterritorial price increases, the Eighth Circuit stated,

> NPM escrow payments are entirely a function of an NPM's sales in Arkansas. The payments are not based on nationwide sales. Nor has there been a showing by appellants that escrow payments by NPMs in Arkansas have any effect, either directly or indirectly, on cigarette prices in other states. NPMs must make escrow payments *to* Arkansas based on that NPM's cigarette sales *in* *178 Arkansas. Arkansas has no control over cigarette prices in

> other states. The MSA calculates an NPM's hypothetical MSA payment in order to refund the excess back to that NPM, but it does not allow Arkansas to control commerce in other states.

Grand River Enters. Six Nations, 574 F.3d at 944. We agree with the Eighth Circuit's analysis. The Louisiana Escrow Statute and the MSA only allow Louisiana to regulate and collect escrow payments based on the sale of cigarettes within Louisiana's jurisdiction. Therefore, there is no violation of the Due Process or Commerce Clause.

VI.

The remaining challenges brought by the plaintiffs rest on the underlying argument that NPMs are compelled to join the MSA to avoid the economic burdens imposed on them by the Escrow Statute. This argument, however, is also foreclosed by this court's recent decision in *Xcaliber.* In *Xcaliber,* the plaintiff asserted that the Escrow Statute "makes doing business as an NPM so unattractive that it compels NPMs to join the MSA ...." 612 F.3d at 368, 380, 2010 WL 2773431, *8, 2010 U.S.App. LEXIS 14513, at *28.[3] The court disagreed, finding that there was no

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[3] In *Xcaliber,* the plaintiff challenged the Allocable Share Revocation ("ASR"). The ASR was an amendment that Louisiana, and all Settling States, passed to the original escrow statutes in order to close a loophole in the original escrow statutes that was advantageous to NPMs. *See* 612 F.3d at 368, 372-73, 2010 WL 2773431, *2-3, 2010 U.S.App. LEXIS 14513, at *6-7 (discussing the reason for the ASR). The Louisiana Escrow Statute considered in the plaintiffs' instant challenge incorporates the alteration of the ASR.

evidence that the Louisiana Escrow Statute created a price or non-price disadvantage for NPMs. *Id.* at 380-81, 2010 WL 2773431, *8-9, 2010 U.S.App. LEXIS 14513, *29-31. Because no disadvantage is created for NPMs by remaining as NPMs, NPMs are not compelled to join the MSA. *Id.* at 381, 2010 WL 2773431, *9, 2010 U.S.App. LEXIS 14513, *31.

Based on the *Xcaliber* court's conclusion that the Escrow Statute does not compel NPMs to become signatories to the MSA, any argument by the plaintiffs based on this premise is foreclosed. With this in mind, we turn to the plaintiffs' claims that the MSA and the Louisiana Escrow Statute violate the First Amendment, the FCLAA, the Commerce Clause and the Due Process Clause, and antitrust laws.

A.

The plaintiffs argue that the MSA and Louisiana Escrow Statute violate the First Amendment because the MSA directly restrains the speech of PMs by forbidding various forms of lobbying and petitioning activity concerning tobacco products and the MSA itself, as well as prohibiting numerous forms of cigarette advertising.

This same argument was raised in *S&M Brands, Inc. v. Summers,* 393 F. Supp.2d 604 (M.D. Tenn. 2005), *aff'd, S&M Brands, Inc. v. Summers,* 228 Fed.Appx. 560, 563 (6th Cir. 2007). In that case, the court stated,

> The Escrow Act ... leaves [NPMs] no worse off financially than they would be under the MSA, because it expressly provides that [NPMs] are entitled to a refund on any amounts paid into escrow that they can demonstrate is in excess

> of the amount they would have paid under the MSA. Further, [NPMs] retain all of the First Amendment and other rights that the PMs gave up when they signed the MSA.

*179 *Id.* at 638. *See also KT&G Corp.*, 535 F.3d at 1134-36 (holding that an escrow statute did not violate NPMs First Amendment rights).

We agree with this reasoning. While the MSA does restrict the speech activities of PMs, the plaintiffs are not PMs and, as previously noted, are not coerced to become PMs. The only statute applicable to the plaintiffs is the Louisiana Escrow Statute, which in no way compels or abridges speech. Therefore, we find no merit to the plaintiffs' First Amendment claims.

B.

The FCLAA states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). The plaintiffs argue that the MSA and Escrow Statute violate the FCLAA because the FCLAA preempts state regulations targeting cigarette advertising, and the MSA and Escrow Statute prohibit certain forms of cigarette advertising.

This same argument has been raised and rejected in *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2003 U.S. Dist. LEXIS 16995, at *48-50 (S.D.N.Y. 2003), *aff'd by, Grand River Enters. Six Nations, Ltd.*, 425 F.3d at 175, and *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp.2d 1179, 1205 (C.D. Cal. 2000). Like the district court below, we agree with the rationale

expressed in those decisions. The plaintiffs are not compelled to join the MSA and the Louisiana Escrow Statute "does not have any connection whatsoever with cigarette packaging, advertising, or promotion." *PTI, Inc.*, 100 F.Supp.2d at 1205. Therefore, the plaintiffs' FCLAA argument must fail.

CONCLUSION

For the above reasons, we AFFIRM the district court's grant of summary judgment in favor of the Attorney General.

AFFIRMED.

APPENDIX B

Unpublished

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

A.B. COKER, INC., ET AL.	CIVIL ACTION NO. 05-1372
VERSUS	JUDGE S. MAURICE HICKS, JR.
JAMES D. "BUDDY" CALDWELL, in his official capacity as LOUISIANA ATTORNEY GENERAL	MAGISTRATE JUDGE HORNSBY

MEMORANDUM RULING

Before this Court are two cross motions for summary judgment. The Motion for Summary Judgment [Record Document 87], filed by Defendant James D. "Buddy" Caldwell, in his official capacity as the Attorney General for the State of Louisiana, is **GRANTED,** and the Motion for Summary Judgment [Record Document 95], filed by Plaintiffs S&M Brands, Inc., Tobacco Discount House #1 Inc., and

Mark Heacock, is **DENIED**. All claims by Plaintiffs are **DISMISSED WITH PREJUDICE.**

FACTUAL BACKGROUND

Beginning in 1994, the attorneys general of several States (including Louisiana) brought lawsuits against the country's four largest tobacco manufacturers alleging that their tobacco products and related marketing had cost the States billions of dollars in increased Medicaid and other healthcare costs incurred while treating the health problems caused by the use of tobacco. The States sought to recoup the costs of these medical services based on theories of consumer protection, antitrust, unjust enrichment, and other state-law remedies.

On November 23, 1998, the state lawsuits were settled by execution of the tobacco Master Settlement Agreement ("MSA"). The MSA was signed by 52 governmental jurisdictions (46 states, including Louisiana, the District of Columbia, Puerto Rico, and four territories) (collectively referred to as the "Settling States")[1] and the four major tobacco manufacturers (Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson) (collectively referred to as the "Original Participating Manufacturers" or "OPMs"). [Doc. 1, ¶27]. The MSA released the OPMs from all past, present, and future tobacco-related legal claims initiated by the States. In return, each OPM agreed to make annual payments into a fund with each OPM's contribution based principally on its national market

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[1] Four states (Florida, Mississippi, Texas, and Minnesota) made separate individual settlements before the MSA. [Doc. 1, ¶ 27].

share. The payments are allocated among the states based upon a fixed formula, with Louisiana receiving approximately 2.26 percent of the payments as its "allocable share." In addition, the OPMs agreed to various restrictions and bans on advertising, political lobbying, and trade association activities, and relinquished legal challenges to state laws and rules regulating tobacco. Id. at ¶ 30.

Other tobacco manufacturers were permitted an opportunity to join the MSA as Subsequent Participating Manufacturers ("SPMs").[2] Those who joined the MSA within a ninety-day window from the execution of the MSA were granted an exemption on MSA payments so long as their yearly market shares do not exceed the larger of their 1998 market share or 125 percent of their 1997 market share. SPMs thus share in the profits generated by the MSA without paying any money to the Settling States, as long as they limit their sales. However, if SPMs increase their sales by selling additional packs of cigarettes, they are required to make a higher MSA payment on each additional pack they sell than the OPMs pay on each pack they sell. After the ninety-day period, other tobacco manufacturers were allowed to join the MSA, but they were not exempt from any portion of the annual payment. Id. at ¶ 34-36.

As an incentive for the Settling States to protect the OPMs market share,[3] the MSA includes a provi-

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[2] Hereinafter, OPMs and SPMs are collectively referred to as PMs.

[3] The MSA requires the OPMs to make substantial payments to the Settling States each year. These costs are "internalized" in the cost of cigarettes and largely, if not entirely, passed on to

sion that, if one of the OPMs loses market share in a particular year, a nationally recognized firm of economic consultants is to determine whether the restraints imposed on the OPMs by the MSA were a significant factor contributing to the market share loss. If so, the OPMs payments under the MSA may be reduced by as much as three times its market share loss. This potential reduction is known as the Nonparticipating Manufacturer Adjustment (or "NPM Adjustment"). The NPM Adjustment is imposed only on those states that fail to enact and enforce a Qualifying Statute prescribed by the MSA. If all but one Settling State enacted a Qualifying Statute, the entire NPM Adjustment would be applied to reduce that one state's MSA payments. Thus, there is strong incentive for all of the Settling States to enact a Qualifying Statute. Id. at ¶ 38-39.

In 1999, Louisiana enacted the "Model Statute", provided for as Exhibit T to the MSA, which is codified in Louisiana Revised Statutes 15:5061 et *seq.* ("Louisiana's Escrow Statute"). Pursuant to its terms, every NPM selling cigarettes in Louisiana is required to either (1) join the MSA and become a participating member, or (2) make an annual deposit into a qualified escrow account of a specified amount of money per cigarette sold in the State during the prior calendar year. Unlike the settlement payments made by PMs under the MSA, which become the property of the State, Louisiana has no right to an NPM's escrow

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consumers in the form of high prices. The ability of NPMs, who are not required to make payments under the MSA, to sell their brands at lower prices poses a threat to the market share held by the OPMs. *See* Doc. 87, p.7-8.

deposits unless or until it obtains a settlement or judgment of tobacco-related claims against the NPM. NPMs are entitled to receive the interest earned on each escrow deposit as it accrues, while the principal amount of each deposit must be held in escrow for twenty-five years. To the extent the funds are not released from escrow to pay a settlement or judgment during those twenty-five years, the escrow funds are to be released and revert back to the NPM. *See* La. R.S. § 5063(C)(2).

Louisiana also enacted "Complementary Legislation," codified in Louisiana Revised Statutes 13:5071 et *seq.*, which provides that in order for a brand of cigarettes to be included on a directory of brands eligible for sale in Louisiana, its manufacturer must either be a PM under the MSA or an NPM in compliance with the Escrow Statute. If cigarette makers are found in violation of the Complementary Legislation, they can be criminally prosecuted and jailed, fined $5,000 for each such violation, and can have their cigarettes seized and destroyed. The statute also subjects makers who violate it to Louisiana's unfair trade laws and other statutes.

The National Association of Attorneys General ("NAAG") is directed by the MSA to "provide coordination and facilitation for the implementation and enforcement of the [MSA] on behalf of the Attorneys General of the Settling States." [Doc. 1, ¶ 31 (citing MSA § VIII(a))]. Payments made by PMs pursuant to the MSA are not made to individual states, but into a central escrow account from which payments are later made to the Settling States. Id. at ¶ 32 (citing MSA, Exhibit B). NAAG also administers the Settling

States' Antitrust/Consumer Protection Tobacco Enforcement Fund, established with $50 million from the OPMs. One purpose of the Fund is to directly implement and enforce the MSA; another is to pay for the investigation and litigation of suspected MSA violations, including enforcement of the MSA's Consent Decrees against PMs and its Qualifying Statutes against NPMs. States must notify NAAG in advance of planned enforcement proceedings, and NAAG must coordinate discovery in such proceedings. Id. at ¶ 31 (citing MSA §§ VII(c)(2), (g), VIII(a)) In addition, NAAG must provide guidance to state assistant attorneys general and legislators about what action by States is sufficient to comply with their duty to diligently enforce the MSA. Id.

PROCEDURAL HISTORY

On August 2, 2005, A.B. Coker, Co., Inc., S&M Brands, Inc., CLP, inc., Tobacco Discount House #1, and Mark Heacock (collectively "Plaintiffs")[4] filed suit against the Louisiana Attorney General seeking to invalidate, on federal constitutional grounds, the MSA and the statutes Louisiana enacted to assist in its implementation.[5] [Doc. 1]. Plaintiffs contend the MSA and Louisiana's Escrow Statute encroach on

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[4] On April 24, 2008, Plaintiffs and Defendant stipulated that A.B. Coker, Co., Inc. and CLP, Inc. be dismissed from the action pursuant to Federal Rule of Civil Procedure 41 (a)(1)(ii), after A.B. Coker, Co., Inc. filed for bankruptcy and CLP, Inc. chose to end its participation in the lawsuit due to financial difficulties. [Doc. 71].

[5] Those statutes are Louisiana's "Escrow Statute" (La. R.S. 13:5061 *et seq.*) and its "Complementary Legislation" (La. R.S. 13:5071 *et seq.*). See, supra.

federal and state power without congressional consent, in violation of the Compact Clause, and potentially violate federal antitrust laws, the First Amendment, the Federal Cigarette Labeling and Advertising Act, and the Bankruptcy Code; are preempted by the Federal Cigarette Labeling and Advertising Act; and impose extraterritorial regulation of interstate commerce in violation of the Commerce Clause and Due Process Clause.[6] [Docs. 1, 111].

Shortly after the Complaint in this action was filed, the Attorney General sought to have it dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Doc. 13. The Magistrate Judge issued a Report and Recommendation [Doc. 43] recommending that the complaint be dismissed. This Court, however, stated that while it was "inclined to agree with the reasoning of Magistrate Hornsby's Report and Recommendation, it [was] constrained by the Fifth Circuit's decision in Xcaliber Int'l Ltd., LLC v. Foti, 442 F3d 233 (5th Cir. 2006)," wherein the Fifth Circuit found that the District Court for the Eastern District of Louisiana erred by granting a Rule 12(b)(6) motion to dismiss a tobacco manufacturer's challenge to Louisiana's Escrow Statute and

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[6] In the Complaint, Plaintiffs also asserted that the MSA and Escrow Statutes violated the Tenth Amendment "by commandeering state legislatures to adopt the Qualifying Statute and delegating their powers to bodies outside the control of either the state or federal governments." [Doc. 1, ¶ 85]. However, the Court dismissed this claim on November 9, 2006, as it was undisputed that the federal government had no involvement with the MSA. *See* Docs. 43, 47, 48.

remanded the case for further proceedings. *See* Doc. 48.

The parties are now before the Court on cross motions for summary judgment. Plaintiffs contend they are entitled to a declaration that the MSA and Escrow Statutes are unconstitutional as a matter of law, and seek to have the Attorney General enjoined from enforcing the MSA and Escrow Statutes. [Doc. 111]. The Attorney General, however, seeks dismissal of the Complaint in its entirety. In support of its motion, the Attorney General points to a significant and growing body of jurisprudence that has rejected claims virtually identical to those asserted by Plaintiffs in this action, including the Eastern District of Louisiana which recently addressed cross motions for summary judgment in Xcaliber and dismissed the plaintiff's claims against the Attorney General. *See* Xcaliber Int't Ltd., LLC v. Caldwell, 2009 WL 1324042 (E.D. La. 2009).

LAW AND ANALYSIS

1. Summary Judgment Standard

Summary judgment is proper pursuant to Rule 56 of the Federal Rules of Civil Procedure "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essen-

tial to that party's case, and on which that party will bear the burden of proof at trial." Id., 477 U.S. at 322, 106 S. Ct. at 2552. If the party moving for summary judgment fails to satisfy its initial burden of demonstrating the absence of a genuine issue of material fact, the motion must be denied, regardless of the nonmovant's response. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the motion is properly made, however, Rule 56(c) requires the nonmovant to go "beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." Wallace v. Texas Tech. Univ., 80 F.3d 1042,1047 (5th Cir. 1996) (citations omitted). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. Little, 37 F.3d at 1075; Wallace, 80 F.3d at 1047. All factual controversies must be resolved in favor of the nonmovant. Cooper Tire & Rubber Co. v. Farese, 423 F.3d 446, 456 (5th Cir. 2005).

2. Constitutional Claims

A. Compact Clause

The Compact Clause of Article I, § 10, of the United States Constitution, provides: "No State shall, without the Consent of Congress,. . . enter into any Agreement or Compact with another State, or with a foreign Power." U.S. Const. art. I, § 10, cl. 3. It is well established that the Compact Clause is not to be applied to every agreement between the States, only "to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of

the United States." Virginia v. Tennessee, 148 U.S. 503, 519, 13 S.Ct. 728, 734 (1893); see also, Northeast Bancorp, Inc. v. Board of Governors of the Fed. Res. Sys., 472 U.S. 159, 175-76, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985); United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978); New Hampshire v. Maine, 426 U.S. 363, 369, 96 S.Ct. 21 13, 48 L.Ed.2d 701 (1976). The test under the Compact Clause, therefore, is "whether the Compact enhances state power *quoad* the National Government." Multistate Tax Comm'n, 434 U.S. at 473, 98 S.Ct. at 813. The agreement or compact does not have to actually usurp the power of the federal government; rather, "the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy." Id. at 812.

Plaintiffs assert that the MSA is an "Agreement or Compact" among the States for purposes of the Compact Clause, and that it is invalid because it has not been submitted to or approved by Congress.[7] [Doc. 1,

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[7] Specifically, Plaintiffs claim congressional consent was required to validate the MSA because the MSA and its supplemental statutes "encroach upon federal supremacy by patently violating the federal antitrust laws, including the Sherman Act;" that the MSA "encroaches upon federal authority and policy by establishing a comprehensive regulatory scheme governing the advertising and promotion of cigarettes," in violation of the preemption provisions of the Federal Cigarette Labeling and Advertising Act, First Amendment, and the Dormant Commerce Clause; "encroaches upon federal supremacy by establishing a nationwide excise tax on cigarettes in the form of annual, perpetual payments by PMs and NPMs (in the form of escrow payments);" prohibits protected lobbying activity in violation of the speech and petition clauses of the First Amendment; and "conflicts with the federal Bankruptcy Code by giving Settling

¶¶ 58-59]. In opposition, the Attorney General contends Plaintiffs' Compact Clause is not applicable to the MSA and, therefore, the Settling States were not required to obtain congressional consent for the MSA. Even if congressional consent was necessary, the Attorney General claims Congress provided it. *See* Docs. 13, 87.

States an unfair advantage over tobacco companies' other creditors." [Doc. 1, ¶¶ 62-65, 661. But see, Xcaliber Int'l Ltd., LLC v. Caldwell, 2009 WL 1324042 (E.D. La. May 7, 2009) (Sherman Act, First Amendment, equal protection, due process); KT&G Corp. v. Attorney Gen. of the State of Oklahoma, 535 F.3d 1114 (10th Cir. 2008) (Sherman Act, First Amendment, equal protection, due process, Commerce Clause); S&M Brands, Inc. v. Cooper, 527 F.3d 500 (6th Cir. 2008) (State sovereign immunity); S&M Brands, Inc. v. Summers, 228 Fed. Appx. 560 (6th Cir. 2007) (Sherman Act, preemption); Star Scientific, Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002), cert. denied, Star Scientific, Inc. v. Kilgore, 537 U.S. 818, 123 S.Ct. 92 (2002) (due process, equal protection, Commerce Clause, Compact Clause); Int'l Tobacco Partners, Ltd. v. Kline, 475 F.Supp.2d 1078 (D.Kan. 2007) (Sherman Act, Dormant Commerce Clause); Grand River Enterprises Six Nations, Ltd. v. Beebe, 41 8 F.Supp.2d 1082 (W.D.Ark. 2006) (antitrust state action immunity doctrine, First Amendment, equal protection, due process, Commerce Clause, Supremacy Clause); Mariana v. Fisher, 226 F.Supp.2d 575 (M.D.Penn. 2002), aff'd, 338 F.3d 189, 198 (3rd Cir. 2003), g&. denied, Mariana v. Pappert, 540 U.S. 11 79, 124 S.Ct. 141 3 (2004) (Sherman Act, *Noerr-Pennington doctrine*, Commerce Clause, Compact Clause); PTI, Inc. v. Philip Morris, Inc., 100 F.Supp.2d 11 79 (C.D. Cal. 2000) (*Noerr-Pennington doctrine*, antitrust state action immunity doctrine, Compact Clause, bill of attainder, Commerce Clause, preemption, equal protection, due process); Hise v. Philip Morris, Inc., 46 F.Supp.2d 1201 (N.D. Okla. 1999), aff'd, 208 F.3d 226 (10th Cir. 2000), cert. denied, 531 U.S. 959, 121 S.Ct. 384 (2000) (Sherman Act/*Noerr-Pennington* doctrine, due process, Compact Clause).

Addressing this same argument, the Fourth Circuit concluded that the MSA implicates the Compact Clause to the extent the States agree on the creation of a single administrative body of national economic consultants. Star Scientific, Inc. v. Beales, 278 F.3d 339, 360 (4th Cir. 2002). However, the Court saw "no reason to conclude that [the MSA] encroaches on federal power." The Fourth Circuit relied on Multistate Tax Comm'n, wherein the United States Supreme Court rejected similar challenges to the Multistate Tax Compact:

> On its face the Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States. There may well be some incremental increase in the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But. . . [t]his pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. . .

434 U.S. at 472-73, 98 S.Ct. at 812-13.

Similarly, while the MSA may result in an increase in bargaining power of the States vis-a-vis the tobacco manufacturers, this increase in power does not interfere with federal supremacy. The MSA "does

not purport to authorize the member States to exercise any powers they could not exercise in its absence." Star Scientific, 278 F.3d at 260 (quoting Multistate Tax Comm'n, 434 U.S. at 473, 98 S.Ct. at 813); see also, Mariana v. Fisher, 226 F.Supp.2d 575 (M.D.Penn. 2002).[8] Nor does the MSA derogate from the power of the federal government to regulate tobacco, as sections X and XVIII(a) specifically provide for adjustments of the MSA's terms in the event Congress passes future laws regulating tobacco and section XVIII(w)(1)(c) expressly states that the provision is enforceable only if consistent with the Bankruptcy Code. *See* MSA §§ X, XVIII(a), XVIII(w)(1)(c). Furthermore, each Settling State could have independently settled its claims against the OPMs, included in the settlement agreements the same provisions contained within the MSA, and independently enacted the Model Act (or Qualifying Escrow Statute). See PTI, Inc. v. Philip Morris, Inc., 100 F. Supp.2d 1179, 1198 (C.D. Cal. 2000). The mere fact that the States acted collectively to settle their disputes with the participating tobacco manufacturers does not establish an encroachment on federal supremacy. Thus, in the absence of any actual or potential encroachment or interference, the Compact Clause does not apply to the MSA and the Settling States were not required to obtain congressional consent.

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[8] Affirmed on jurisdictional grounds without addressing the merits, 338 F.3d 189, 198 (3rd Cir. 2003), cert. denied, Mariana v. Pappert, 540 U.S. 1179, 124 S.Ct. 1413 (2004).

Even if the MSA did require congressional consent, the Court agrees with the Attorney General that Congress has plainly provided it. The Supreme Court has long held that "Congress may consent to an interstate compact by authorizing joint state action in advance *or by giving expressed or implied approval to an agreement the States have already joined.*" Cuyler v. Adams, 449 U.S. 433,441, 101 S.Ct. 703, 708, 66 L.Ed.2d 641 (1981) (emphasis added) (citing Virginia v. Tennessee, supra, 148 U.S. at 521, 13 S.Ct. at 735; Green v. Biddle, 8 Wheat. I , 85-87, 5 L.Ed. 547 (1823)). In this case, Congress expressly recognized the MSA's existence in 1999, when amending the Medicaid statute, and disclaimed any federal interest in the moneys received by the Settling States pursuant to the Agreement. Specifically, the amendment provided that the federal rules governing health overpayments

> (i). . .shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco productions. . .and State Attorneys General, or as part of any State settlement or judgment reached in litigation initiated or pursued by a State against one or more manufacturers.
>
> (ii). . . a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

42 U.S.C. § 1396b(d)(3)(B)(i-ii). Unquestionably, Congress' express reference to the MSA and its provision

for disposition of the settlement proceeds to the Settling States demonstrates Congress' approval to the agreement.

Accordingly, for all the reasons stated above, the Court finds that Plaintiffs' Compact Clause claim fails as a matter of law.

3. Federal Cigarette Labeling and Advertising Act

The Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq.*, sets forth a comprehensive federal program to deal with cigarette labeling and advertising. Section 1334(b) provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). In Count II of the Complaint, Plaintiffs contend that the MSA and Escrow Statute are preempted by the FCLAA. Federal law supersedes state law when Congress expressly states an intention to pre-empt state law, or when a federal regulatory scheme is sufficiently comprehensive so as to imply congressional intent to preoccupy the entire field. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707,713,105 S.Ct. 2371,2375,85 L.Ed.2d 714 (1985) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Plaintiffs claim the Settling States and PMs, through the MSA, have created a national regulatory scheme on the advertising and marketing of cigarettes that violates and is preempted by the FCLAA. Because

the MSA prohibits many forms of cigarette advertising, Plaintiffs argue Louisiana's Escrow Statute compels tobacco manufacturers to either join the MSA and thus restrict their advertising, or make substantial annual payments into escrow. [Doc. 1,¶75].

Despite Plaintiffs assertions, the Court is inclined to agree with the growing number of courts that have expressly rejected this argument. *See* Grand River Enterprises Six Nations, Ltd. v. Prior, 2003 WL 22232974, "16-17 (S.D.N.Y. 2003), aff'd in part, 425 F.3d 158 (2nd Cir. 2005); Omaha Tribe of Nebraska v. Miller, 311 F.Supp.2d 816,823-28 (S.D. Iowa 2004); PTI, Inc. v. Philip Morris, Inc., 100 F.Supp.2d 1179, 1204-06 (C.D. Cal. 2000). Louisiana's Escrow Statute requires tobacco product manufacturers to join the MSA or make an annual deposit into an escrow account to cover potential future liability. The statute does not in any way concern cigarette packaging, advertising, or promotion. "To the extent the plaintiffs object to the voluntary advertising restrictions to which the signatories to the [MSA] have agreed, they lack standing to challenge these provisions. Moreover, the restrictions are not legislatively required." Grand River Enterprises Six Nations, Ltd., 2003 WL 22232974, *I7 (citing PTI, Inc., 100 F.Supp.2d at 1205). In fact, Congress has refused to regulate the entire field of tobacco, "opting instead to create a distinct regulatory scheme focusing mainly on the labeling and advertising of tobacco products." Omaha Tribe of Nebraska, 31 1 F.Supp.2d at 823 (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137, 120 S.Ct. 1291, 1303, 146 L.Ed.2d 121 (2000)). As there is no indication that

Congress intended, either explicitly or implicitly, for the FCLAA to preempt the entire field of tobacco regulation, the Court concludes that the FCLAA does not preempt Louisiana's Escrow Statute. Thus, Plaintiff's FCLAA preemption claim fails as a matter of law.

4. Commerce Clause and Due Process Clause

Count III of the Plaintiff's Complaint alleges that the MSA violates the Commerce Clause and Due Process Clause by regulating interstate commerce in an extraterritorial fashion. [Doc. 1, ¶ 791. Plaintiffs similarly allege that Louisiana's Escrow Statute is unconstitutional under the Commerce Clause and Due Process Clause because of its extraterritorial reach. at 81. As with Plaintiffs' other claims, these arguments have been repeatedly rejected by other courts in cases challenging the MSA and its Qualifying Statutes.

1. Commerce Clause

The Commerce Clause gives Congress the power "[tlo regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. While the Commerce Clause is more frequently invoked as authority for federal legislation, there is also a dormant or negative aspect of the Clause that limits the power of States to enact legislation that adversely affects interstate commerce. *See* Hughes v. Oklahoma, 441 U.S. 322, 326,99 S.Ct. 1727,60 L.Ed.2d 250 (1979); Piazza's Seafood World, LLC v. Odum, 448 F.3d 744,750 (5th Cir. 2006). The dormant Commerce Clause's limitation on State power, however, "is by no means absolute." Lewis v. BT Investment Mgrs., Inc.,

447 U.S. 27, 36, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980). In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters relating to the health, life, and safety of their citizens, even though interstate commerce may be affected. Id.; Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440, 443-44, 80 S.Ct. 81 3, 81 6, 4 L.Ed.2d 852 (1 960).

To determine whether a state statute violates the dormant Commerce Clause, the court conducts a two-tiered analysis. First, the court must determine whether the state statute facially discriminates against interstate commerce. Oregon Waste Sys., Inc. v. Dept. of Environmental Quality, 51 1 U.S. 93, 99, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994); Hughes, 441 U.S. at 336, 99 S.Ct. at 1736. In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per* se invalid." Id. Second, if the regulation has only an "incidental effect" on interstate commerce, the Court must applying the balancing test derived from Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). A nondiscriminatory regulation will generally be upheld unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Id., 397 U.S. at 142, 90 S.Ct. at 847. "If a legitimate local purpose is found, ... the question becomes one of degree." Id. "[Tlhe extent of the burden that will be tolerated will of course depend on the nature of the lo-

cal interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Id.

Plaintiffs allege that the MSA and the Escrow Statute directly regulate interstate commerce because the PM's payments under the MSA are based on the national market share and the Escrow Statute directly links escrow payments to MSA payments. [Doc. 1, ¶ 79; Doc. 111] . This argument is unavailing. Louisiana's Escrow Statute requires that NPMs pay into an escrow account a certain amount based on a rate "per unit sold," which is defined as "the number of individual cigarettes sold in the state" by the NPM. La. R.S. §§ 13:5062(1O), 5063(C). But the statute makes no distinction based on cigarette origin; rather, the requirement applies equally to in-state, out-of-state, and foreign tobacco manufacturers. *See* Star Scientific, Inc. v. Beales, 278 F.3d 339, 356 (4th Cir. 2002); Grand River Enterprises Six Nations, Ltd. v. Prior, 425 F.3d 158, 169 (2nd Cir. 2005); PTI Morris, Inc. v. Philip Morris, Inc., 100 F.Supp.2d 1179, 1201 (C.D.Cal. 2000).

Plaintiffs also allege that the Escrow Statute imposes a burden on interstate commerce that is clearly excessive in relation to any putative local benefits because the statute mandates the collection of escrow payments from NPMs, regardless of whether they are located in, or sell cigarettes in, Louisiana, if their cigarettes ultimately end up in Louisiana. [Doc. 1, ¶81; Doc. 111] . Louisiana's Escrow statute serves the legitimate state interest of ensuring that the state has a source of funds available to provide medical care to persons with smoking-related health conditions from

those tobacco manufacturers who are not members of the MSA and, thus, are not already compensating the state for these costs. The statute also prevents tobacco manufacturers who were not members of the MSA from earning quick, large profits and then becoming judgment proof before being sued by the State. *See* La. R.S. § 13:5061; Star Scientific, 278 F.3d at 257. Nevertheless, Plaintiffs argue an unreasonable "burden" is imposed on NPMs to monitor distributors and the number of cigarettes distributed to the state because the escrow payment is based on all cigarettes sold in Louisiana, whether directly or indirectly through a distributor. But as the Magistrate Judge previously pointed out:

> [A] manufacturer should be able to contractually obligate those who purchase cigarettes from it to distribute the cigarettes only for sale in particular states. Furthermore, if the manufacturer has not filed the proper certificates to have a particular brand approved for sale in Louisiana, it is illegal for a distributor to sell that brand in the state. Louisiana law, La. R.S. 13:5073(C), makes it unlawful for "any person" to sell a brand or affix a stamp to a package of a brand that has not been properly certified by the manufacturer and approved by the state. These rules reduce the alleged burden that manufacturers have to monitor the stream of their products.

[Doc. 43]; see also, Star Scientific, 278 F.3d at 357 (recognizing that because distributors in Virginia were already required to record the number of cigarettes they stamp with the Virginia excise stamp and

report that information to the state, "any additional burden caused by requiring manufacturers to obtain this information from the distributors is minimal.").

Considering the important state interests advanced by Louisiana's Escrow Statute and the minimal burden placed on interstate commerce by its operation, the Court concludes that the burden on interstate commerce is not clearly excessive when compared to the significant local benefits. Accordingly, Plaintiffs' Commerce Clause claim fails as a matter of law.

2. Due Process Clause

Plaintiffs include with their Commerce Clause claim a similar Due Process Clause claim based on the alleged extraterritorial reach of the MSA and Louisiana's Escrow Statute. As discussed above, the Escrow Statute imposes escrow requirements on NPMs, regardless of whether or not their cigarettes are sold in the state directly or indirectly through a distributor. But there is no evidence that Plaintiffs' have been required to make escrow payments on account of cigarettes that have been sold without their knowledge of consent. To the contrary, as a result of Louisiana's Complementary Legislation, see supra, an NPM's cigarettes may not be lawfully sold in Louisiana unless the NPM has taken affirmative steps to have its cigarettes certified for sale in the state. *See* La. R.S. § 13:5073(C). Thus, because any due process challenge that might be made by a NPM would be frivolous, Plaintiffs' Due Process claim lacks merit.

CONCLUSION

Accordingly, the Court concludes that there are no genuine issues of material fact remaining and that

Plaintiff's challenges to the MSA and Louisiana's Escrow Statute fail as a matter of law. Therefore, the Attorney General's Motion for Summary Judgment [Record Document 87] is **GRANTED,** and the Plaintiffs' Motion for Summary Judgment [Record Document 95] is **DENIED.** All claims by Plaintiffs are **DISMISSED WITH PREJUDICE.**

THUS DONE AND SIGNED in Shreveport, Louisiana, this 24th day of September, 2009.

s/ S. Maurice Hicks, Jr.

S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE